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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

No. 630

CHARLES C. HOBART, DOING BUSINESS AS THE HOBART CABINET COMPANY,

Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS, SIXTH CIRCUIT, AND BRIEF IN SUPPORT THEREOF.

L. H. SHIPMAN,
F. L. SHIPMAN,
BAIRD BROOMHALL,
Counsel for Petitioner.

INDEX.

Subject Index.

	Page
Petition for writ of certiorari	1
Proceedings in the case	1
Statement of facts	3
Jurisdiction	9
Opinion below	9
Questions presented	9
Reasons for granting petition	9
Brief in support of petition	13
Appendix	17

Table of Cases Cited.

Atlas Underwear Company v. *N. L. R. B.*, 116 F. (2d) 1020 (C. C. A. 6)	11, 13
Consumer's Power Company v. *N. L. R. B.*, 113 F. (2d) 38	11, 13
E. I. DuPont DeNemours & Co. v. *N. L. R. B.*, U. S. Court of Appeals, Fourth Circuit, 1940, 116 F. (2d) 388. Petition of N. L. R. B. for writ of certiorari denied May 5, 1941. 61 Sup. Ct. 959	11, 15
H. J. Heinz Company v. *N. L. R. B.*, 61 Sup. Ct. 320, 311 U. S. 514, 85 L. Ed. 303	11, 13
Martel Mills Corp. v. *N. L. R. B.*, 4th Circuit, 1940, 114 F. (2d) 624, 633, 634	11, 15
N. L. R. B. v. *Asheville Hosiery Company*, 108 F. (2d) 288 (C. C. A. 4)	11, 13
N. L. R. B. v. *Mathieson Alkali Works*, 114 F. (2d) 796, at 799, 802, 803	11, 15
N. L. R. B. v. *Sands Mfg. Co.*, 306 U. S. 332, 59 Sup. Ct. 508	11, 15
N. L. R. B. v. *Sparks-Withington Company, et al.*, United States Court of Appeals, Sixth Circuit. Decided April 16, 1941. 119 F. (2d) 72	11, 15
N. L. R. B. v. *Whittier Mills Co.*, 5 Cir., 111 F. (2d) 474, 479	11, 15

Statutes Cited.

Judicial Code, Sections 239 and 240 as amended (U. S. C. A., Title 28, Sections 346 and 347)	9
National Labor Relations Act, 49 Stat. 449	9

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

To the Supreme Court of the United States and the Honorable Judges Thereof:

The Petitioner, Charles C. Hobart, doing business as The Hobart Cabinet Company, respectfully prays this Honorable Court for a Writ of Certiorari to the United States District Court of Appeals, for the Sixth Circuit, for the reasons hereinafter set out.

Proceedings in the Case.

On the 19th day of March, 1940, a complaint was filed with the National Labor Relations Board against Charles

C. Hobart, doing business as the Hobart Cabinet Company, Troy, Ohio, the petitioner, charging him with unfair labor practices toward his employees, within the meaning of Section 8, Subdivision (1) and Section 2, Subdivisions (6) and (7) of said Act (Complaint, Exhibit 1-H, R. 9-10).

March 29th, 1940, Charles C. Hobart filed his answer, denying that he had been guilty of unfair labor practices, as charged, and asking that the complaint be dismissed (Exhibit 1-C, R. 19-26).

Notice of hearing on the complaint was duly issued and served (R. 11) and pursuant thereto the matter was heard before Martin Raphael, Trial Examiner, at Troy, Ohio, April 19, 1940 (R. 63-141).

At the close of the testimony introduced in behalf of the Board, Charles C. Hobart, then respondent, interposed a motion to dismiss the complaint for the reasons therein set out (R. 28). The motion was renewed at the close of all the testimony. The Trial Examiner in his Intermediate Report overruled this motion (R. 33).

The Trial Examiner in the Intermediate Report (R. 31 to 43, inclusive) upon his findings of fact and conclusions of law, found that Charles C. Hobart was guilty of unfair labor practices as charged; recommended that he be required to cease and desist therefrom and post notice in his plant, for sixty (60) consecutive days, stating that he would cease from:

> "In any manner interfering with, restraining, or coercing his employees in the exercise of their rights to self-organization, to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection, as guaranteed in Section 7 of the National Labor Relations Act" (R. 44).

After consideration of the record and the exceptions, the Board affirmed the findings of the Trial Examiner, found

Charles C. Hobart guilty of unfair labor practices, in the particulars specified in its decision, and ordered him to cease and desist therefrom and post a notice accordingly (R. 46).

Charles C. Hobart thereupon effected his appeal to the United States District Court of Appeals for the Sixth Circuit. Upon hearing, the appeal was denied and the finding of the National Labor Relations Board affirmed, May 8, 1941. Charles C. Hobart then filed a petition for rehearing, which was denied on June 25, 1941.

Statement of Facts.

Charles C. Hobart the petitioner, is an individual doing business as Hobart Cabinet Co. His plant is located at Troy, Ohio, where he is engaged in the manufacture and sale of filing cabinets, desks, stock storage equipment and other articles. During the year 1939, respondent purchased raw materials valued at $250,000. Of this amount, about 12 per cent was secured from without the State of Ohio. During the same period, respondent sold finished products valued at approximately $776,730, of which approximately 87.9 per cent were shipped to points outside the State of Ohio. Approximately 93 per cent of said products were shipped F.O.B. Troy, Ohio (R. 69).

In December 1939, several of petitioner's employees manifested a desire to engage in collective bargaining. One of them, Harry Keyton, prepared a petition in their behalf (Board Exhibit No. 2, R. 26) bearing the following heading:

> "We, the undersigned employees of the Hobart Cabinet Co., 111 S. Water Street, Troy, Ohio, do hereby sign this petition of our own free will to organize for the purpose of Collective Bargaining as a group as defined under the labor laws of the United States."

At various times between December 26, 1939, and the third week of January, 1940, employees Yenger, Cruikshank, Carey and Schurr obtained signatures thereto from their fellow employees in the plant (R. 89, 90 and 99).

On or about December 28 or 29, Hobart, then on vacation in Florida, received a telephone call from his wife in Troy. She told him that Superintendent Wright thought he should be notified of a certain restlessness in the plant and conditions there. The next day, Hobart telephoned Wright. In the course of this conversation, Wright told Hobart that the men were gathering in the plant in groups; that the dissatisfaction was caused by something in connection with the Christmas bonus. Asked whether Wright said anything about unions, Hobart testified that it was his impression that he did not, although he admitted that Wright might have mentioned unions (R. 135 to 138).

January 5, 1940, Hobart returned to Troy from Florida. Directly upon his return, he proceeded to interview, individually, virtually all of his 130 employees. His purpose in doing so was to learn more about the unrest and dissatisfaction concerning which he had heard several accounts.

Lester Williams was one of the first men to be called into Hobart's office. This occurred promptly on Hobart's return, Friday, January 5, 1940. According to Williams' testimony, Hobart asked him why "the trouble was brewing in the shop". Williams testified that it was "because wages were too low to make a fair living." Hobart, during the conversation, explained that a raise in wages would necessitate raising the price of cabinets; that if his price for cabinets were higher than his competitors', fewer cabinets would be manufactured, thus diminishing employment (R. 79). During the conversation, Hobart said, regarding union organization, according to Williams, that he did not like to see it, but that if they did he would have to deal with them, there being nothing he could do about it (R. 86).

Hobart also stated to Williams that if the men wanted to organize it was their own affair, and their legal right to do so (R. 83, 121). He also told Williams he understood that Dale Yenger had circulated a paper among the fellows that worked around him, and that he (Hobart) would "rather deal with the fellows direct instead of having collective bargaining" (R. 80, 130).

According to Hobart's version of his talk with Williams, he told Williams that there had been some unrest and that he wanted to know if Williams had anything to "complain of himself or if there was anything I could do to explain wage conditions or anything in general that I could explain to him." At this point, Hobart testified "he (Williams) spoke immediately about, as near as I remember, about the fact that some of the boys, as he said, were going to organize. I didn't ask him that especially, but that was the explanation that he volunteered" (R. 121). After stating that the men had a right to organize, Hobart told Williams that the only possible difficulty he could see with collective bargaining was that there might be an increase in costs, which might adversely affect his ability to compete in the trade and mean less employment. Hobart then mentioned, among other things, that he would take care of some of the men during the summer slump by using them in his orchard instead of the plant, (a custom Hobart had followed for two years) (R. 122).

Between January 5 and January 20, Hobart interviewed, individually, almost all of his 130 employees. The precise content of each of these conversations is not disclosed in the record. Among those called into Hobart's office, besides Williams, were employees Campbell, Braswell, Carey, Yenger and Cruikshank. At the hearing before the Trial Examiner, they testified for the Board. The substance of their testimony was to the effect that Hobart said to them

that competitive conditions disabled him from granting wage increases. The week following January 5, 1940, Hobart raised the wages of virtually all his employees (R. 122, 123).

On February 13, 1940, several of Hobart's employees arranged with Coleman Claherty, a representative of the American Federation of Labor, to apply for a charter. At the same time, Claherty gave them membership application cards (Board's Exhibit No. 4) (R. 89, 90, 96). During the morning of February 14, these cards were distributed to employees in the plant before work started and were collected during the morning and the noon hour on that day. About 5 minutes before quitting time of the same day, foremen distributed to Hobart's employees a card, prepared at his direction, containing two typewritten questions:

> "Do you wish a union to bargain for your rate of pay?
>
> "Or would you rather have things as they are now with wage increase when I can justify it and chance of extra later on?" (R. 91, 125, 126, Exhibit 3, page 27).

Hobart testified that he told the foremen and the timekeeper that it was unnecessary to sign the cards or to fill them out but that the men, if they so desired, were to indicate their wish and preference regarding the two propositions stated in the questions (R. 125).

Several of the employees testified that their respective foremen told them that they need not sign the cards. The employees were directed by their foremen to place the cards in a box provided therefor (R. 88, 95, 100, 113).

According to Hobart's testimony, the reason for distributing the cards was to determine the wishes of his employees so that he could plan his future business course more accurately. When he was asked whether the cards

were circulated "with the idea of interfering with or discouraging the formation of a union", Hobart testified:

> "I don't think—there may have been a shade of it but not enough to feel—it was largely for my own information. Not the formation of a union however."

He stated further that, "I have to advertise each week to secure business and I had accounts payable in considerable quantity to pay for and to maintain things and my own morale and condition, I felt I should know the condition of the wishes of the employees" (R. 126).

Of approximately one hundred and thirty-one cards distributed, thirty-eight were not returned. Ninety-three were returned marked, and forty-three of these were signed (R. 125).

Paul Cruikshank, an employee (R. 107), alleged in his testimony that on February 16, 1940, foreman Jesse Arthur in a conversation told him that if Hobart found out "who started the union, he was going to lay them off, or fire them". Arthur also stated that Hobart could not afford to pay a $1.00 or $1.25 an hour as wages. Foreman Arthur testified (R. 115, 116) that he did not recall whether he spoke to Cruikshank on February 16, then admitted that he "probably" did speak to him on that day. Respecting the subject matter of the conversation, Arthur denied telling Cruikshank that if Hobart found out who belonged to the union, "he'd fire them or lay them off" (R. 114). As to whether he made the statement about Hobart's not being able to pay $1.00 or $1.25 an hour, Arthur testified that he said to Cruikshank, "I don't think that he (Hobart) could probably pay that much" (R. 115, 116, 117).

A few days following the distribution of the cards (Exhibit 3, R. 27), foreman Arthur asked employee Beecher Carey, according to the latter's testimony, whether he had "received a card to join the union". When Carey replied in the negative, Arthur said, "Well, they can join if they want to, but I don't think it is going to do them any good."

During the same conversation with Carey, he stated that Hobart did not have to run the shop and that if wages were raised to a dollar or a dollar and a quarter an hour, Hobart couldn't do it and he would close the shop (R. 92).

Employee Dale Yenger testified (R. 100, 101, 102) that in or about the middle of February, foreman Roy Brown asked him whether he wanted "collective bargaining on his wages". Yenger said "No," but expressed a desire for a wage increase of at least 10¢ more per hour. Brown then wrote it down, went to the factory office, returned about 20 minutes later and told Yenger that "his offer was 33¢ an hour."

Yenger "imagined" that "his" referred to Hobart, but there is no positive evidence to this effect. Yenger was then receiving 43¢ per hour. A week before Yenger's conversation with Brown he (Yenger) had received a wage increase of 3¢ per hour. Brown did not testify.

On or about February 20, Hobart received a telegram at Miami, Florida, from Troy, Ohio, notifying him that a charge had been filed "with the Labor Board in Cleveland." He immediately wired a denial and returned to Troy, arriving on February 21st. Around noontime of that day, he posted on the factory bulletin board the following notice:

> "It has come to my attention that the questions asked you about a week ago were construed by some to mean that I was interfering with your rights for collective bargaining.
>
> "It was not my intention at that time nor is it now to interfere with anyone's rights.
>
> "You will remember that in my personal interview, I stated to each of you very definitely that I did not want to say a word against your organizing.
>
> "If any of you have misinterpreted the meaning of my card with the questions, I wish to correct this erroneous impression.
>
> (Signed) CHARLES C. HOBART."

(Exhibit 2, R. 29, 30.) The bulletin board where the notice was posted was the customary place for posting of notices and was in the washroom at the Hobart plant where all the men stopped at one time or another. This notice remained upon the bulletin board for several days (R. 128, 132, 133). Hobart testified that he inquired about the notice a day or two after it was posted and it was still up (R. 132).

For the Court's convenience, the testimony of foreman Jesse Arthur referred to in the above statement of facts and in the opinion of the court below is hereto attached as "Appendix."

Jurisdiction.

The date of the decree sought to be reviewed herein was rendered June 5, 1941 (R. 143). Date of the order denying a rehearing was entered June 25, 1941 (R. 153). The jurisdiction of this Court is invoked under the provisions of Judicial Code, Sections 239 and 240, as amended, U. S. C. A., Title 28, Sections 346 and 347, and the National Labor Relations Act, 49 Stat. 449, Sec. 10(e).

Opinion Below.

The order of the Circuit Court of Appeals was entered on May 8, 1941, and appears at page 143 of the Record. The decree was entered on June 5, 1941, and appears at page 144 of the Record. The order denying the petition for rehearing was entered June 25, 1941, and appears at page 153 of the Record.

Questions Presented.

The questions presented are inherent in the reasons relied upon for the granting of the petition as next hereinafter stated, and will not be duplicated.

Reasons for Granting Petition.

Petitioner earnestly contends and respectfully submits that the Writ of Certiorari should be granted to review the

decision of said Circuit Court of Appeals for the Sixth Circuit, for the following reasons:

First. The Circuit Court of Appeals for the Sixth Circuit erred in affirming the finding of the National Labor Relations Board that there is substantial evidence that petitioner has been guilty of unfair labor practices defined by Section 8 (1 and 2) of the Act, 29 U. S. C. A., Section 158 (1 and 2) and interference with the exercise by its employees of their right of self organization guaranteed by Section 7 of the Act, 29 U. S. C. A., Section 157.

Second. The Circuit Court of Appeals for the Sixth Circuit erred in affirming the finding of the National Labor Relations Board that petitioner is guilty of unfair labor practice under the Act (29 U. S. C. A. 157, 158), because of petitioner's responsibility for statements of a minor supervisory employee, regarding the formation of a union in petitioner's plant because the undisputed evidence shows that—

(a) The statements were made without authorization by the petitioner and without his knowledge.

(b) The minor supervisory employee who made the statements had no power or authority to determine the policy of petitioner regarding unions or unionization, nor to hire or discharge other employees.

(c) The statements made by said minor supervisory employee did not reflect petitioner's attitude toward unionization in that petitioner had adopted a "hands off" policy and had specifically advised his employees that they could "do as they pleased" about the formation of a union in petitioner's plant.

Third. The Circuit Court of Appeals for the Sixth Circuit erred in its application of the law to the facts in this case in that—

(a) The court found that the following authorities are applicable and sustain the court's ruling and decree against petitioner.

H. J. Heinz Company v. *N. L. R. B.*, 61 S. Ct. 320, 311 U. S. 514, 85 L. Ed. 303;

Consumer's Power Company v. *N. L. R. B.*, 113 F. (2d) 38;

Atlas Underwear Company v. *N. L. R. B.*, 116 F. (2d) 1020 (C. C. A. 6);

N. L. R. B. v. *Asheville Hosiery Company*, 108 F. (2d) 288 (C. C. A. 4).

(b) The court erred in refusing to find that the following authorities are applicable herein and justify a finding and order in favor of the petitioner.

E. I. DuPont DeNemours & Co. v. *N. L. R. B.*, U. S. Court of Appeals, Fourth Circuit, 1940, 116 F. (2d) 388. Petition of N. L. R. B. for writ of certiorari denied May 5, 1941. 61 S. Ct. 959;

N. L. R. B. v. *Sparks-Withington Company, et al.*, U. S. Court of Appeals, Sixth Circuit. Decided April 16, 1941. 119 F. (2d) 72;

Martel Mills Corp. v. *N. L. R. B.*, 4th Circuit, 1940, 114 F. (2d) 624, 633, 634;

N. L. R. B. v. *Mathieson Alkali Works*, 114 F. (2d) 796, at 799, 802, 803;

N. L. R. B. v. *Sands Mfg. Co.*, 306 U. S. 332, 59 S. Ct. 508;

N. L. R. B. v. *Whittier Mills Co.*, 5 Cir., 111 F. (2d) 474, 479.

Petitioner is cognizant that a finding by the National Labor Relations Board is conclusive if supported by substantial evidence and that neither a Circuit Court of Appeals nor this Honorable Court may weigh the evidence nor determine the credibility of the witnesses. It is the

contention of the petitioner, however, that the undisputed facts in the transcript of the record, filed herewith, bring this case within the established rule that isolated speeches made or individual opinions expressed by underlings, though having some authority, in casual conversation with fellow employees, which speeches are not authorized or encouraged or even known to the management, ought not to be imputed to the employer as breaches of the law; that the personal zealousness and individual bias against a union, evidenced by statements of one of petitioner's foremen, a minor supervisory employee, should not bind the petitioner, where such statements were made without his knowledge nor authority and did not reflect his policy toward unionization.

WHEREFORE, your petitioner prays that a writ of certiorari may be issued out of and under the seal of this Honorable Court, directed to the United States Circuit Court of Appeals for the Sixth Circuit, commanding the said court to certify and send to the Supreme Court of the United States for its review and determination, on a day certain to be therein designated, a full and complete transcript of the record and of all proceedings in the said Circuit Court of Appeals in this cause; that the said decree of the said Circuit Court of Appeals in the said cause may be reversed by this Honorable Court, and that your petitioner may have such other and further relief in the premises as to this Honorable Court may seem meet and just.

CHARLES C. HOBART, *Doing Business as the Hobart Cabinet Company,*

By L. H. SHIPMAN,
F. L. SHIPMAN,
BAIRD BROOMHALL,
Counsel for Petitioner.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

This case is clearly not controlled by the cases cited by the Circuit Court of Appeals. In *H. J. Heinz Company* v. *National Labor Relations Board,* 61 S. Ct. 320, 85 L. Ed. 303, 311 U. S. 514, a general foreman and several other foremen and forewomen, in charge of departments and factory buildings, actually engaged in disparaging the union in the employer's plant and threatening employees with discharge if they joined the union. There foremen had power to employ and discharge workmen in the plant and were considered by the employees to be representing the employer.

In *Consumer's Power Company* v. *National Labor Relations Board,* 113 F. (2d) 38, a supervisory foreman, in charge of twenty line crews, comprising some 300 men, went far beyond the grounds of strict neutrality in coercing employees to refrain from joining the union.

In the case of *Atlas Underwear Company* v. *National Labor Relations Board,* 116 F. (2d) 1020, the employer hired undercover men to spy on union activity, and there is nothing in that case which sustains the finding of the Circuit Court of Appeals under the rule of respondeat superior.

In *National Labor Relations Board* v. *Asheville Hosiery Company,* 108 F. (2d) 288, the supervisory employee who interfered with the union activity of the employees was treasurer and general manager of the plant and threatened a shut down of the plant if the unrest caused by union activity continued.

The facts in the case at bar are not even analogous to the facts in the above cases. Jesse Arthur, petitioner's foreman, was in charge of a few men and was without power to employ or discharge anyone. He was a small foreman in a comparatively small plant in a small town. He

talked, he expressed his individual opinions, his personal bias as all small foremen, in small plants, in small towns do all over this country. And he did not influence anyone against the union. The employees of petitioner formed their union just the same, inasmuch as they had already been advised by petitioner that they had a legal right to do so and that there was nothing he could do about it.

Arthur's statements were not made to several employees nor by an executive such as a factory superintendent or a foreman with authority to speak for his employer or to hire or discharge men in the plant. Consequently, Arthur's statements could not have had the force of threatening the security of the employment of any of the Hobart employees. Furthermore, these statements did not represent Hobart's attitude toward the formation of a union, which was expressed to Lester Williams, the president of the union, in the beginning of the activity toward organization.

The undisputed evidence is that Hobart said that the law gave his employees the right to organize, and to do as they pleased and that he would just have to deal with them as there was nothing he could do about it (R. 83-86).

It is well settled that so long as the employees are publicly assured by the employer in good faith of employer's neutrality and impartiality regarding labor organization and employees' membership therein, and no interference is imposed by the management, the fundamental purpose of the National Labor Relations Act is fulfilled.

It is also well settled that in the absence of any policy of proscribed discrimination an employer should not be held accountable for individual statements of opinion upon the part of a foreman not authorized by the employer and not resulting in interference with or domination of the right of the employees to organize.

The undisputed evidence in the record justifies the application of this statement of the law rather than that referred

to by the Circuit Court of Appeals and appearing in the cases cited by the Circuit Court of Appeals to support its finding and order against the petitioner of June 25, 1941.

N. L. R. B. v. *Sparks-Withington Company, et al.*, U. S. Court of Appeals, Sixth Circuit. Decided April 16, 1941. 119 F. (2d) 78;

E. I. DuPont De Nemours & Co. v. *N. L. R. B.*, U. S. Court of Appeals, 4th Circuit, 1940. 116 F. (2d) 388;

Martel Mills Corp. v. *N. L. R. B.*, 4th Circuit, 1940, 114 F. (2d) 624, 633, 634;

N. L. R. B. v. *Mathieson Alkali Works*, 114 F. (2d) 796, at 799, 802, 803;

N. L. R. B. v. *Sands Mnfg. Co.*, 306 U. S. 332, 59 S. Ct. 508;

N. L. R. B. v. *Whittier Mills Co.*, 5 Cir., 111 F. (2d), 474, 479.

Conclusion.

(1) The Circuit Court of Appeals, Sixth Circuit, erred in finding that there is substantial evidence in the record to support an order against the petitioner.

(2) The Circuit Court of Appeals, Sixth Circuit, cite inapplicable authorities to sustain their order against petitioner.

(3) Said decision is not in accordance with similar previous applicable decisions of the Circuit Court of Appeals, Sixth Circuit, and other Circuit Courts of Appeals.

(4) This decision is in direct conflict with decisions upon analogous facts rendered by the Circuit Court of Appeals, Sixth Circuit, and other Circuit Courts where, as in the instant case, substantial evidence clearly shows no violation of the National Labor Relations Act, under the rule of respondeat superior.

For the foregoing reasons, a writ of certiorari should issue to the United States Circuit Court of Appeals for the Sixth Circuit.

Respectfully submitted,

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Counsel for Petitioner C. C. Hobart, Doing Business as the Hobart Cabinet Co.

APPENDIX.

Unauthorized Statements of Supervisory Employee.

Unauthorized statements of Jesse Arthur, foreman in petitioner's plant, for which the petitioner was held responsible by the National Labor Relations Board and by reason of which petitioner was found to be guilty of unfair labor practices, as defined under Section 8 (1 and 2) of the Act, 29 U. S. C. A. 158 (1 and 2) and in violation of Section 7 of the Act, 29 U. S. C. A. 157.

(Testimony of employee, Beecher Carey, Record 89 to 94, inclusive.)

Q. Did you have any conversation with your foreman, which—with your foreman, Jesse Arthur, in relation to the union?

A. Yes. I walked over and asked for a new brush.

Q. When was that, Mr. Carey?

A. About the middle of February.

Q. Of 1940?

A. Yes, sir.

Q. You walked over and asked for a new brush?

A. Yes.

Q. Who did you ask?

A. Jesse Arthur, the foreman.

Q. All right. Proceed with the conversation.

A. He asked me if I received a card to join the union and I said no. He said: "Well, I seen some of the other fellows have them." He said: "Well, they can join if they want to, but I don't think it is going to do them any good."

He said: "Mr. Hobart didn't have to run this shop."

Q. Proceed.

A. That is about all there was said.

Q. Do you recall whether or not Mr. Arthur said anything about raising wages?

A. Oh, yes, he said, if you have to raise wages to a dollar or a dollar and a quarter an hour, that he couldn't do it, he would have to close the shop.

Q. Was that said during the same conversation you had with Mr. Arthur concerning the union?

A. Yes, sir.

Q. Who commenced this talk which you say you had with Foreman Arthur some time in the middle of February after the distribution of Board's Exhibit No. 3 and Board's Exhibit 4 for identification?

A. He started as I walked over after a paint brush.

Q. You walked over after a paint brush without saying anything to him?

A. I asked him for a paint brush.

Q. What did he say?

A. He started to get the paint brush and started the conversation about whether I received a card.

Q. Now your testimony is that Mr. Arthur said the employees could join the union if they wanted to, but what else?

A. No; he said they could join the union if they wanted to, but he didn't think it would do them much good if Mr. Hobart had to pay a dollar or a dollar and a quarter an hour, because he could not afford it, and he would just shut the shop up.

Q. Did he say anything else?

A. No, that is all that was said.

Another employee, Paul Cruikshank, in the paint department at the Hobart Plant, of which Jesse Arthur was foreman, testified (Record 107 to 109, inclusive) as follows:

Q. (By Mr. Shipman:) You say he (Arthur) stood and talked to you for half an hour?

A. 25 minutes.

Q. On the afternoon of February 16th?

A. That is right.

Q. What else did he say?

A. He said that Mr. Hobart could not afford to pay a dollar or a dollar and a quarter an hour for wages.

Q. How did you happen to start this conversation?

A. Jesse Arthur started it.

Q. What was the first thing he said?

A. He just came over to me, and I had started to work, and he said if Mr. Hobart found out who signed or started this union, he was going to lay them off or fire them.

Q. If he found out?
A. Yes.
Q. I thought you said on direct that he had found out?
A. I didn't say he had found out.
Q. And what did you say?
A. I said that is nothing to me.
Q. What else was said?
A. That is all that was said.
Q. That is all that was said?
A. Yes.
Q. What else was said in that conversation?
A. About the dollar or dollar and a quarter an hour.
Q. That is all that was said about that?
A. Yes; that is all that was said.
Q. Nothing else said?
A. That was all.
Q. That was all that was said?
A. Yes.
Q. And it took 25 minutes to do it?
A. Right.

Mr. Shipman: That is all.
Mr. Johnstone: That is all.

By Trial Examiner Raphael:

Q. Was this talk which Mr. Arthur had with you during your working hours?
A. Yes.
Q. How do you know it took 25 minutes?
A. I looked at the clock.
Q. Did you look at the clock when the conversation started?
A. Yes.
Q. Do you remember everything that was said during that conversation?
A. That is about all he said.
Q. Did it take him 25 minutes to make those remarks?
A. He is a pretty slow talker sometimes.
Q. Why did you look at the clock?
A. Because we had been ordered to.

Q. By whom?

A. When Claherty was in here, he told us he was not allowed to interfere with us, and was not supposed to talk to us during working hours about the union.

Q. You might be wrong about the time, might you not?

A. No.

Q. Could you be mistaken when you say that is all you talked about?

A. That is all he said to me and that is all I said to him.

Q. And that took 25 minutes?

A. That is right.

Q. Did Mr. Arthur talk to you continuously for 25 minutes or did he interrupt himself during that time and do any work?

A. No, he didn't interrupt himself, he just pranced around.

Q. Did you interrupt his conversation or attempt at any time to do your work?

A. I tried to work.

Q. And during that 25 minute period he was talking without any interruption from you?

A. He did not talk continuously.

Q. What did he do between the time when he did not talk.

A. Stood there and looked at me.

Q. How long did he stand and look at you off and on?

A. I don't know.

Q. What portion of the 25 minutes was spent by Mr. Arthur in observing you without talking, approximately?

A. About half of it.

Q. And in addition to that you say he speaks slowly?

A. Yes, sir.

Q. Did you say anything to Mr. Arthur at all while he talked to you?

A. Except I told him it was nothing to me.

Q. Is that the only thing you said to him?

A. That is all.

Q. How did the conversation end?

A. Well, about the dollar to a dollar and a quarter an hour, he said that Hobart would not pay that, and I said, "Well, that is nothing to me."

Q. And that was the end of the conversation, was it?

A. Yes, sir.

JESSE ARTHUR, the foreman, testified (R. 116, 119, 120), as follows:

A. I might have said that Hobart could not afford to pay a dollar an hour.

Q. That is even if you didn't know if Mr. Hobart could not pay, you might have said that Mr. Hobart cannot pay a dollar or a dollar and a quarter an hour?

A. Yes.

Q. Is that correct?

A. That is right.

Q. Now, can you return to the time you spoke to Mr. Cruikshank again, and if so, tell me whether or not you did make a statement to Mr. Cruikshank in substance to the effect that Mr. Hobart could not pay a dollar or a dollar and a quarter an hour?

A. I said I don't think probably he could pay that much.

Q. Now, your testimony is that you said to Mr. Cruikshank the following words in substance: "I don't think Mr. Hobart can pay dollar and a quarter".

A. I don't know whether I said it to Mr. Cruikshank or not.

Q. Did you say it to anybody else?

A. Well, I don't just remember.

Q. Would you say that you did say it to somebody else, but not to Mr. Cruikshank?

A. Well, I don't know. There was so much talking going on down there, you know; I don't know, I might have stated it to Mr. Cruikshank.

Q. You might even have stated it to him?

A. Yes.

Q. Do you do a lot of talking to the employees?

A. No, sir.

Q. Are they friends of yours?

A. Yes.

Q. You do talk to them?

A. Yes, sir, about the work.

Q. Do you talk to them about other things besides the work?

A. Well, not particularly.

Q. Some of the employees in your department have worked for or with you for some time, haven't they?

A. Yes, sir.

Q. And you know those men pretty well, don't you?

A. Yes.

Q. And you have talked to them about other things, besides their work, haven't you?

A. Well, yes.

Q. Well, tell me, which is it, have you or have you not?

A. I have.

Q. You talked to them about things besides work?

A. Yes.

Q. That is a natural thing with a man you know for a long time, isn't it?

A. Sure.

Q. Do you know Mr. Beecher Carey?

A. Yes, sir.

Q. Does he work in your department?

A. Yes, sir.

Q. Do you recall having had a conversation with him in the middle of February, 1940?

A. No, sir, I don't. I talk to him, yes, sure, I don't know that it was about the union or anything.

Q. Well, I didn't ask you what the conversation was. You knew that the union was organizing in the middle of February, 1940?

A. Yes.

Q. At that time, according to Mr. Carey, you and he had a conversation in which he said you said to him that they can join the union if they want to. Did you say that to him?

A. Probably I did.

Q. Tell us the conversation?

A. Yes, something about—I says, "Well, anybody that wants to join the union is perfectly welcome". I says, "That's O. K. with me; I have got no jurisdiction over none of them. They are welcome to join the union".

Q. Is that all you said?

A. That is all I said.

Q. Did you tell him at that time that you did not think it would be a good idea, though?

A. No, sir, I didn't because I didn't know.
Q. Did you express your opinion about it?
A. No, sir.
Q. Did you talk to any of the other employees about the union aside from Mr. Carey?
A. No, sir.

CHARLES C. HOBART testified (R. 139) as follows:

Trial Examiner Raphael: Well, about—or along about Christmas of 1939, and the early part of 1940, did you or did you not discuss with any single or a group of foremen the question of the organization among the employees in your plant into a union?
The Witness: I probably did, but I don't remember which ones, or exactly what I would say.

By Trial Examiner Raphael:

Q. You don't recall the conversation?
A. Not definitely.
Q. Did you talk to Mr. Arthur about it?
A. I don't remember of any conversation that was especially along that line.

INDEX

	Page
Opinions below	1
Jurisdiction	1
Question presented	2
Statute involved	2
Statement	2
Argument	5
Conclusion	7
Appendix	8

CITATIONS

Cases:

H. J. Heinz Co. v. *National Labor Relations Board*, 311 U. S. 514 6

International Ass'n of Machinists v. *National Labor Relations Board*, 311 U. S. 72 6

Statute:

Act of July 5, 1935, c. 372, secs. 7 and 8 (1), 49 Stat. 449 (29 U. S. C., Supp. V, secs. 157, 158) 8

421676—41

In the Supreme Court of the United States

OCTOBER TERM, 1941

No. 630

CHARLES C. HOBART, DOING BUSINESS AS THE HOBART CABINET COMPANY, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court below (R. 143–144) is unreported. The findings of fact, conclusions of law, and order of the National Labor Relations Board (R. 46–59) are reported in 25 N. L. R. B., No. 80.

JURISDICTION

The decree of the court below (R. 144–145) was entered on June 5, 1941. A petition for rehearing filed by petitioner (R. 147–151) was denied on June

25, 1941 (R. 153). The petition for a writ of certiorari was filed on September 20, 1941. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925, and Section 10 (e) and (f) of the National Labor Relations Act.

QUESTION PRESENTED

The sole question is whether there is substantial evidence to support the Board's finding that petitioner violated Section 8 (1) of the Act.

STATUTE INVOLVED

The pertinent provisions of the National Labor Relations Act are set out in the Appendix, *infra*, p. 8.

STATEMENT

Upon the usual proceedings, the Board issued its findings of fact, conclusions of law, and order (R. 46–59). The facts found by the Board and shown by the evidence may be summarized as follows:[1]

When petitioner's employees commenced to organize late in December, 1939 (R. 49; 71–72, 77), Charles Hobart, proprietor of the Hobart Cabinet Company, shortly thereafter held individual interviews with almost all of his 131 employees (R. 50,

[1] In the following statement, the references preceding the semicolons are to the Board's findings and the succeeding references are to the supporting evidence.

51; 130, 122). In those talks he stated the objection to collective bargaining that through wage increases it would adversely affect the company's competitive position, with the result of decreased business and employment (R. 51, 54–55; 121–122, 73–74, 79, 99); yet, while these interviews were still in progress, Hobart inaugurated a general wage increase ranging from 3 to 6 cents per hour (R. 51; 123–124). He informed one employee during the interviews that he would prefer to "deal with the fellows direct" (R. 50; 80). Later, petitioner's foreman Brown sought to induce employee Yenger, a leader in the organizational movement, to substitute individual for collective bargaining with respect to Yenger's wages (R. 53–54; 100–101).

The Board found (R. 54–55) that petitioner's questioning of the employees coincidentally with their first organizational efforts, coupled with petitioner's veiled threats of lay-offs if they persisted in collective action, constituted a direct deterrent to the employees' exercise of rights protected by the Act. The Board further found (R. 55–56) that the granting of the general wage increase within a week of petitioner's disclaimer of ability to do so was designed to forestall the employees' movement toward self-organization by eliminating the major incentive for such employee action, and that the attempt to bargain individually with Yenger was made for the same purpose.

Thereafter, on the same day that American Federation of Labor membership application cards were distributed among the employees for the first time (R. 51; 84), petitioner conducted a poll in the plant upon the question: "Do you wish to bargain for your rate of pay? Or would you rather have things as they are now with wage increases when I can justify it and chance of extra later on?" (R. 52; 27, 124–125, 133, 81, 83, 90, 100, 105). This move, Hobart conceded at the hearing, "might have [had] a shade" of intent to discourage the formation of a union (R. 55; 126). The Board found (R. 55) that, in the circumstances, the vote was an interference with the employees' union activities; it also concluded that Hobart's action in posting in the plant, subsequent to the filing of charges against him, a notice stating that his prior activities were not to be construed as an interference with the employees' collective bargaining rights (R. 127), was not "adequate to remedy the effect of the unfair labor practices found" (R. 57).

Finally, Cruikshank, a union leader, testified that foreman Arthur warned him that if Hobart "found out who signed or who started the union, he was going to lay them off or fire them" (R. 52; 105); there was also evidence that Arthur, after questioning Carey, another prominent employee organizer, as to his union membership, observed

that the employees "could join the union if they wanted to, but he didn't think it would do them much good if Mr. Hobart had to pay a dollar or a dollar and a quarter an hour, because he could not afford it, and he would just shut the shop up" (R. 53; 94, 92). In view of Arthur's admitted supervisory status (R. 112) the Board disregarded petitioner's claim that Arthur's remarks were unauthorized, and held petitioner chargeable therefor (R. 53).

The Board concluded that petitioner had engaged in unfair labor practices within the meaning of Section 8 (1) of the Act (R. 57, 58); its order required petitioner to cease and desist from its unfair labor practices and to post notices (R. 57–59).

On September 20, 1940, petitioner filed in the court below a petition to review and set aside the Board's order. The Board answered, requesting enforcement of its order. On May 8, 1941, the court handed down its opinion (R. 143–144), and on June 5, 1941, entered its decree (R. 144–145), enforcing the Board's order. Petitioner's motion for rehearing (R. 147–148), filed June 7, 1941, was denied on June 25, 1941 (R. 153).

ARGUMENT

1. Petitioner's contention (Pet. 10) that the Board's findings of unfair labor practices are not

supported by substantial evidence presents no question of general importance. In any event, the evidence summarized in the Statement (*supra*, pp. 2–5) affords abundant support for the challenged findings.

2. Petitioner's claim (Pet. 10–11) that the Board and the court below erred in holding him accountable for the anti-union behavior of foreman Arthur is both immaterial and without merit. It is immaterial because the petitioner himself engaged in a variety of conduct violative of Section 8 (1); this conduct alone furnished adequate foundation for the Board's order. The claim is without merit because under the decisions of this Court petitioner is answerable for foreman Arthur's anti-union conduct——which was entirely consistent with that of petitioner[2]——despite the absence of authorization or ratification. *International Ass'n of Machinists* v. *National Labor Relations Board*, 311 U. S. 72; *H. J. Heinz Co.* v. *National Labor Relations Board*, 311 U. S. 514.

[2] In view of this consistency between the conduct of petitioner and foreman Arthur, petitioner cannot bring this feature of the case within the supposed principle (Pet. 14) that "in the absence of any" anti-union policy on his part, an employer is not chargeable on account of the unauthorized coercive statements of a foreman; and by the same token there is no warrant for petitioner's seeming claim of conflict (Pet. 15) with cases said to apply such a principle.

CONCLUSION

The petition presents no question of general importance, and there is no conflict of decisions; it should, therefore, be denied.

Respectfully submitted.

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OCTOBER 1941.

APPENDIX

The pertinent provisions of the National Labor Relations Act (Act of July 5, 1935, c. 372, 49 Stat. 449; 29 U. S. C., Supp. V, Secs. 157, 158) are as follows:

> SEC. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection.
>
> SEC. 8. It shall be an unfair labor practice for an employer—
>
> (1) To interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7.
>
> * * * * *

U. S. GOVERNMENT PRINTING OFFICE: 1941

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1941.

No. 630.

CHARLES C. HOBART, doing business as THE HOBART CABINET COMPANY,

Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

REPLY BRIEF FOR CHARLES C. HOBART, DOING BUSINESS AS THE HOBART CABINET COMPANY, PETITIONER.

Counsel for the National Labor Relations Board cite at page 6 of their brief, the case of *International Association of Machinists, Tool and Die Makers Lodge No. 35* v. *National Labor Relations Board*, 311 U. S. 72; 85 Law Ed. 5.

This Honorable Court, at page 9 of its decision in this case, clearly states its position regarding coercive statements by minor supervisory employees, as follows:

> "The employer, however, may be held to have assisted the formation of a union even though the acts of the so-called agents were not expressly authorized or might not be attributable to him on strict application of the rules of respondeat superior. We are dealing here not with private rights (*Amalgamated Utility Workers* v. *Consolidated Edison Co.*, 309 U. S. 261, 84 Law Ed. 738, 60 S. Ct. 561) nor with technical concepts pertinent to an employer's legal responsibility to third persons for acts of his servants, but with a clear legislative policy to free the collective bargaining process from all taint of an employer's compulsion, domination, or influence. The existence of that interference must be determined by careful scrutiny of all the factors, often subtle, which restrain the employees' choice and for which the employer may fairly be said to be responsible."

Petitioner contends that the application of this rule by The National Labor Relations Board and the several Circuit Courts of Appeals is not consistent nor in accordance with equitable principles and the exigencies of substantial justice. The National Labor Relations Board apparently considers this rule axiomatic and that it is impelled thereby to find against an employer, whether honest or not, and read into his every word and every act a sinister purpose to compel, dominate or interfere with the collective bargaining process. The Board has followed that procedure in the case at bar and the Court of Appeals, Sixth Circuit, without opinion, has approved it.

It is the contention of Petitioner that the Supreme Court of the United States did not intend to establish and has not established a hard and fast rule, which automatically imposes a penalty for unfair labor practice upon an employer, whenever a minor supervisory employee expresses his per-

sonal views, or individual bias against unionization, or makes indiscreet remarks to the same effect.

The Supreme Court does not invest the National Labor Relations Board with a prerogative and power to attribute subtlety to an employer when the record discloses none, and base its findings of unfair labor practice upon a misinterpretation of the evidence in a given case. It has done so, however, in the case at bar.

The Board has consistently, for instance, misquoted (Exhibit 3, Re. 27, Respondent's Brief, Page 4) in the following language:

> "Do you wish to bargain for your rate of pay * * * "?

The proper words of Exhibit 3 are:

> "Do you wish a union to bargain for your rate of pay * * * "?

This misquotation is indicative of the Board's consistent misconstruction of the evidence. There is no basis for its conclusion that Hobart had the slightest intention of interfering with, restraining or coercing his employees in the exercise of their rights to unionization and collective bargaining. There is no evidence in the entire record that Hobart made any disparaging remarks whatsoever regarding unions or unionization or collective bargaining, nor is there a single act or statement by Hobart which can, except by misconstruction, be construed as coercive. There is no evidence in the record that any statement or act of Hobart's actually interfered with the formation of a union or the rights of his employees.

On the other hand, Hobart made clear and definite statements of his neutral policy to his employee, Lester Williams, who was afterwards made president of the union. (Rec. 78 and seq.) He thereafter (Ex. 3, Rec. 27) by a questionnaire,

gave his employees an unhampered freedom of choice, and finally (Ex. 2, Rec. 29) Hobart reiterated his neutral policy towards unionization and collective bargaining.

The statements of foreman Jesse Arthur, (Appendix to Petition for Writ of Certiorari) were neither direct nor indirect quotations from Hobart, nor a statement of Hobart's policy, nor were they made in Hobart's interest. Hobart did not at any time say directly or by inference that he would close the shop if his employees joined a union.

The undisputed facts in the Record disclose that it had long been Hobart's custom to discuss problems of mutual interest with his employees and that they were friendly discussions. It is not reasonable nor in accord with common sense to conclude that Hobart conferred with his employees about unions or submitted a questionnaire to them for the purpose of interfering with, restraining or coercing them in the exercise of their rights guaranteed under the Act, particularly when he specifically and consistently advised them of his neutral position regarding unionization.

The National Labor Relations Act was not intended to vest managerial authority. In the effort of the National Labor Relations Board to prevent unfair labor practice and to secure to the employee his rights guaranteed by the Act, the welfare of the honest employer should not be overlooked, nor the Board permitted to make its authority a pretext for interference with the employer's fundamental rights which are distinctive to our type of economy.

Martel Mills Corp. v. *N. L. R. B.*, 114 Fed. 2d., 624, 633.

Quaker State Oil Refining Corp. v. *N. L. R. B.*, 119 Fed. 631, 632.

Because this case involves an interpretation of the application by the National Labor Relations Board, and the Courts

of Appeals of fundamental policies under the Act, as well as the rights of an 'honest employer", it merits the consideration of this Honorable Court and the Writ of Certiorari should be granted.

Respectfully submitted,

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